

May 18 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No.

ORIGINAL

IN THE MATTER OF:

D.K.D.,

An Alleged Mentally Ill Person.

FILED

MAY 18 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

PETITION FOR OUT-OF-TIME APPEAL

The Office of the Appellate Public Defender requests that the Court permit an out-of-time appeal for D.K.D.'s case under Mont. R. App. P. 4(6), which provides:

In the infrequent harsh case and under extraordinary circumstances amounting to a gross miscarriage of justice, the supreme court may grant an out-of-time appeal. An out-of-time appeal must be requested by verified petition supported by affidavits, records, and other evidence establishing the existence of the extraordinary circumstances claimed. Extraordinary circumstances do not include mere mistake, inadvertence, or excusable neglect.

The basis for the request is as follows:

The Office has been in contact with D.K.D., as well as D.K.D.'s counsel of record, Mr. Jon Oldenburg. It was Mr. Oldenburg's understanding that D.K.D. did not desire to appeal. However, Mr. Tom Dooling at Disability Rights Montana contacted the Office of the Appellate Defender to discuss D.K.D.'s appeal. After that conversation, undersigned counsel contacted Mr. Oldenburg who, in turn, contacted D.K.D.

As of May 14, 2010, the OAD became aware officially that D.K.D. wanted to appeal his case to this Court. At this stage, not much is known about D.K.D.'s appeal other than it involves D.K.D.'s commitment as a developmentally disabled individual. The commitment order was filed and entered on March 16, 2010, which made the notice of appeal due May 17, 2010.

Undersigned counsel respectfully requests the OAD to file D.K.D.'s notice of appeal one day late. The notice of appeal was not timely filed due, in large part, to the manner in which the OAD became involved in this appeal. Ms. Sarah Braden is OAD's paralegal and office manager. She is responsible for filing all of the notices of appeal.

In order for her to manage the volume of cases coming into the OAD each day, procedures are in place for trial and contract attorneys alike to follow when they transfer a case to the OAD office. Upon following such procedures, the case register allows for Ms. Braden to calendar the cases. Again, given the manner in which this case was transferred to the OAD--namely, by Disability Rights Montana contacting the OAD--the OAD was not substituted in as counsel of record. Consequently, it was not calendared as is the normal practice, and the notice of appeal was late by one day.

As Justice Nelson artfully stated in his concurrence in *In re T.P.*, 2008 MT 266, ¶ 22, 345 Mont. 152, 190 P.3d 313, "Developmentally disabled persons are entitled to no less protection of their fundamental constitutional rights to due

process of law, to individual dignity, and to seek safety, health and happiness than are persons who violate society's criminal laws." Such rights are protected under Article II, Sections 17, 4, and 3, respectively, of the Montana Constitution.

To guarantee D.K.D.'s constitutional rights have been protected with regard to his commitment, the OAD requests an order permitting it to file an out-of-time appeal for D.K.D. A failure to allow D.K.D. to pursue his appeal will result in a gross miscarriage of justice given the constitutional rights at stake for him.

Respectfully submitted this 18th day of May, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

By: Joslyn Hunt
JOSLYN HUNT
Chief Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing
Petition for Out-of-Time Appeal to be mailed to:

PHYLLIS D. SMITH
Clerk of the District Court
P.O. Box 1074
Lewistown, MT 59457-1074

THOMAS P. MEISSNER
Fergus County Attorney
712 West Main Street
Lewistown, MT 59457-2562

Copy mailed to D.K.D.

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
Helena, MT 59620-1401

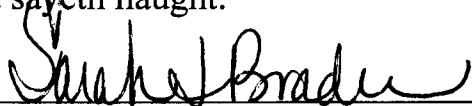
DATED: May 18, 2010 Joselyn Hunt

STATE OF MONTANA)
 : ss.

County of Lewis and Clark)

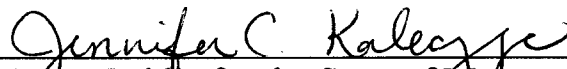
I, Sarah J. Braden, being first duly sworn upon my oath, depose and state as follows:

1. I am the Paralegal and Office Manager for the Appellate Defender Office (OAD);
2. I am responsible for filing all notice of appeals and transcript requests for the OAD upon attorneys filing an appellate referral form.
3. I did not receive an appellate referral form in the above listed case and since the contract OPD attorney did not substitute the OAD as counsel of record, I could not obtain any information on the case due to the case being sealed.
4. By the time I received the district court case register report, the notice of appeal in the above case was 1 day out of time.
5. Further your affiant sayeth naught.



Sarah J. Braden

SUBSCRIBED AND SWORN to before me this 18 day of
May, 2010.



Notary Public for the State of Montana
Residing at Lewis & Clark CO
My commission expires 6-20-2013